

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209433

DATE: April 12, 1983

MATTER OF: Foam-Flex Inc.

DIGEST:

While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation § 1-703(b)(2) where data submitted by proposed awardee in bid indicated \$5 million size standard may be exceeded.

Foam-Flex Inc. (FFI), protests a contracting officer's refusal to consider FFI's protest against F.J. Dahill Company's (Dahill) size status for the purposes of the present procurement. The contract is for roofing work to be performed at the Bradley Air National Guard Base, East Granby, Connecticut, and was awarded to Dahill under invitation for bids (IFB) No. DAHA06-82-B-0010, a small business set-aside issued by the United States Property and Fiscal Office for Connecticut (USPFO-CT). The contracting officer was of the opinion that a letter submitted by FFI did not constitute a protest of Dahill's size status since it did not contain sufficient evidence in support of FFI's claim.

We sustain the protest.

Three bids were opened on September 24, 1982. Dahill was the low bidder. Shortly thereafter, FFI questioned the contracting officer concerning the eligibility of Dahill as a small business under the \$5 million average 3-year annual receipts size standard set forth in the IFB. In response to FFI's inquiry, the contracting officer reviewed Dahill's bid to determine whether Dahill had certified itself as a small business and also allegedly contacted the Small Business Administration's (SBA) regional office to verify the applicable small business size standard. The SBA regional office reportedly informed the contracting officer that the applicable size standard was \$9.5 million average annual

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receipts. (We note that the SBA regional office later denied that it had given this information.) FFI was advised of this fact and was also informed by the contracting officer that if the award was delayed, funds for the project would be lost. Based upon this conversation, FFI declined to institute a formal protest at that time.

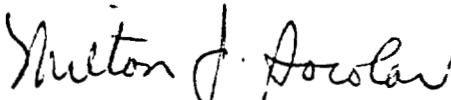
On September 29, 1982, however, FFI discussed the matter with the SBA and was told that the size standard was actually \$5 million. FFI then decided to file a protest and a letter was delivered to the contracting office on September 29, 1982. The letter indicated that in FFI's opinion Dahill did not qualify as a small business since it exceeded the guidelines set forth in the IFB. Under Defense Acquisition Regulation (DAR) § 1-703(1) (Defense Acquisition Circular (DAC) No. 76-19, July 27, 1979), the protest was timely since it was filed within the 5-day time period provided.

The contracting officer reviewed the letter sent by FFI and determined that it did not comply with the requirements of DAR § 1-703(1) since it did not contain sufficient evidence to support FFI's allegation. Due to this deficiency, it was determined that the letter was not a "protest" and as a result, the contracting officer did not then forward the matter to the SBA. The contract award proceeded as originally planned and Dahill was awarded the contract on September 30, 1982. Subsequently, the protest was sent to SBA as an after award protest for a prospective size determination. SBA declined to consider the matter because SBA considered the protest to be nonspecific.

Generally, in the absence of information prior to award that would reasonably impeach a bidder's self-certification or a timely size protest, a contracting officer may accept a small business size certification at face value. Keco Industries, Inc., 56 Comp. Gen. 878 (1977), 77-2 CPD 98, Eller & Company, Inc., B-191986, June 16, 1978, 78-1 CPD 441. The self-certification mechanism was adopted as a practical solution with the knowledge that a case-by-case investigation of size status would be extremely expensive and time consuming and with the understanding that small business concerns in a particular industry are in the best position to know the size status of their competitors. B-168933, April 3, 1970.

In this instance, FFI relied on its knowledge of the contractors in the area and of the roofing business in general in contesting Dahill's eligibility as a small business concern. Even though we recognize that FFI could possibly have furnished additional information about Dahill, we find the specifics of the protest not to be the major concern here. Rather, we find the contracting officer's response to the evidence submitted by FFI was inadequate. A cursory examination by the contracting officer of the Construction Contractor Experience Data, accompanying Dahill's bid, would have indicated that Dahill listed receipts during the previous 3 years in excess of the \$5 million size standard set out in the IFB. Although there appears to have been some confusion as to the exact standard to be applied, there is no evidence in the record that the contracting officer ever reviewed the sales data submitted by Dahill in order to determine whether Dahill would have qualified under either the \$5 million or \$9.5 million size standard. If this action had been taken, the contracting officer, who had the relevant information rather than FFI, could have filed his own size protest. See DAR § 1-703(b)(2) (DAC No. 76-19, July 27, 1979).

Accordingly, we sustain the protest. However, since the contract has been substantially completed, no remedial relief is available in this case.

for 
Comptroller General
of the United States